IN THE CORPORATION COURT OF THE CITY OF ALEXANDRIA, VA.

STATE *ex rel.* ROBERT S. BARRETT *v.* URBAN S. LAMBERT.

Argued July 26, 1912. Decided August 3, 1912.

1. Elections—Municipal Offices—Quo Warranto.—Where a contestant for office is duly elected and qualified, and is ready and willing to enter upon the duties of his office, but the contestee usurps and holds on to the same, quo warranto is the proper remedy.

2. Same—Same—Same.—It is not necessary in such case that the relator should have attempted to exercise his right to the office and that such right should have been denied him, before he can apply for the writ.

3. Same—Same—Nature of Election—Ordering Election—Notice.—While an election to fill a vacancy in a municipal office elective by the people, is under the terms of § 110, Code 1904, a special election, it is not a special election which must be ordered by any officer; hence the provisions of § 116, Code 1904, do not apply.

4. Municipal Officers—Term of Office—Beginning of Term.—Under § 103, Code 1904, the term of office of a person chosen at a special election to fill a vacancy in any public office commences upon his qualification, and not upon the issuance of his certificate of election by the clerk.

5. Municipal Officers—Who Are.—He is a municipal officer whose duties relate purely to municipal affairs, for example, attorney for the city, mayor, city surveyor, the various heads of city departments, members of council, etc.

6. Same—Same—Councilmen.—Members of city councils are municipal officers.

7. State Officers—Who Are.—He is a state officer who, although he is elected by the qualified voters of a municipality, and although his duties, etc., are limited to the confines of the municipality, performs in the discharge of those duties any public service in which the people of the state at large are interested. Within this class would be, for example, the commonwealth's attorney of a city, city sergeant, police officers, and police justice unless his jurisdiction were limited by law to the trial of violations of ordinances of the city, etc.

8. Statutes—Construction—Repeal.—Statutes in pari materia should be read and construed together as if they formed part of the same statute and were enacted at the same time, and where there is a discrepancy or disagreement among them, such should be reconciled, if possible.

9. Same—Same—Intention of Legislature.—A cardinal rule in the

construction of statutes is that the intention of the legislature ought to prevail.

10. Same—Repeals by Implication.—Where an act of the legislature is manifestly intended to embrace and include the whole legislation on the subject to which it refers, then the provisions of former laws on that subject are repealed by implication.

11. Same—Same—Case at Bar.—Section 1015e, Code 1904, which provides that when any vacancies shall occur in the council of a city having one branch, or in either branch of the council of any city having two branches, by death, resignation, removal from the ward, failure to qualify, or from any other cause, the council, or the branch, as the case may be, in which such vacancy occurs, shall elect a qualified person to fill the vacancy for the unexpired term, is impliedly repealed by an act approved Feb. 17, 1906, pp. 17-18, providing that in case of vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city or town council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people and shall have qualified for the next succeeding term, or when such general election does occur during the unexpired term at which such vacancy can be filled, such city or town council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified.

12. Same—Same.—When two statutory provisions in pari materia are passed at different times and are irreconcilable, the court will give effect to the last passed.

Judge C. E. Nicol, for Plaintiff.
Judge J. K. Norton, for Defendant.

OPINION.

R. H. L. CHICHESTER, J.: The facts of this case are agreed and are fully set out in the petition of the relator with the exception that it is agreed that the certificate of election to Robert S. Barrett was issued on the 20th day of June and not the 25th as set out in said petition.

The case is before the Court upon demurrer, and, by agreement of counsel waiving a jury, upon the merits.

There are six grounds of demurrer. For convenience, grounds 1, 2 and 6 will be discussed together, and grounds 3 and 5 will be discussed together, and ground 4 will be last considered.

First Ground of Demurrer:

"(1) It is not alleged in the petition for a writ of quo warranto that the said Robert S. Barrett has made any demand or

endeavored in any way, to exercise the office of a member of the Common Council of the City of Alexandria, Virginia, or that he has been denied any rights as such member since his alleged qualification as a member of the said body, when he took the oath of office before the Clerk of the Corporation Court of the City of Alexandria, Virginia on the 28th day of June, 1912."

Second Ground of Demurrer:

"(2) The appeal of the members of the Council, while in session, from the ruling of the President of said Common Council that the said Barrett was entitled to take his oath of office before said President as a member of that body, and the overruling of this opinion of the President of the Common Council by the members thereof, did not deny the said Barrett any rights; the members of the Common Council had a right to differ with the opinion of the President as to whether Mr. Barrett was entitled to be sworn in by him and were entitled to appeal from the decision of the President on that point, but this action of the members of the City Council did not prevent the said Barrett from being sworn in by the President of the Council, nor prevent the President of the Council from swearing him in; and the said Barrett certainly could not have any right to act as a member of the City Council and could not have claimed to be a member of the City Council until the 28th day of June, 1912, when he took his oath of office before the Clerk of the Corporation Court, as set out in the petition."

Sixth Groung of Demurrer:

"(6) That the said petition does not set out facts or law to sustain the claim that the said Barrett is entitled to membership in the said Common Council in the place and stead of Urban S. Lambert. On the contrary from the statements of said petition respondent, Urban S. Lambert is entitled to hold said office until September, 1914."

The agreed facts show that Robert S. Barrett applied to S. G. Brent, Commonwealth's Attorney for the City of Alexandria to apply for a writ of Quo Warranto, etc. against Urban S. Lambert, and that said Brent refused to apply for said writ, and said Barrett petitioned the Corporation Court aforesaid for same, pursuant to Section 3023 of the Code 1904; that Herbert S. Snowden had been elected a member of the City Council of said City from the 1st ward, on the 2nd Tuesday in June, 1910, at the regular election, had qualified as such for the term ending September 1st, 1914, and had departed this life on April 15th, 1912. That the Common Council had elected Urban S. Lambert to fill the vacancy occasioned by the death of said Snowden for the full unexpired term ending September 1st, 1914. That said Lambert qualified and entered upon the performance of

his duties. That said Robert S. Barrett was elected by the duly qualified voters of said 1st ward of said City as remember of said Council to fill the vacancy occasioned by the death of said Snowden at the regular June election, 1912, prescribed by law, for the balance of the unexpired term of said Snowden. That certificate of election was issued to him on the 20th of June, and that he presented himself before said Council with said certificate to qualify and that said council refused to qualify him, whereupon on the 28th day of June he qualified before the Clerk of the Corporation Court of Alexandria in the manner prescribed by law. That Robert S. Barrett is a qualified person to hold office of member of Common Council from the 1st ward of said City; that he was duly *elected* and that he duly *qualified* as such, and that the term of office of said Lambert as a member of the Common Council ipso facto ceased and ended as a member of said Council upon the qualification of said Barrett; that said Barrett is willing and anxious to perform the duties of the office to which he was elected, but that said Lambert yet intrudes into and usurps said office and claims to be entitled to hold the same until September 1st, 1914.

Urban S. Lambert claims title to the office by election by the Common Council under § 1015e, Code 1904, while Robert S. Barrett claims that this statute has been repealed by implication by an act of the General Assembly of Virginia, approved February 17th, 1906, pp. 17-18 of said Acts.

Conceding for the time being, that the other grounds of demurrer are not well taken, we have here, a clear conflict of title to office. The contestant duly elected, qualified, ready and willing to enter upon the duties of his office, the contestee usurping and holding on to the same.

Where these conditions exist Quo Warranto is the proper remedy. Kilpatrick *v.* Smith, 77 Va. 347; Walkins *v.* Venable, 99 Va. 440.

Under these decisions, it is my opinion upon the first ground of demurrer, that if Robert S. Barrett had duly qualified as a member of Council, subsequent to his election, and if Urban S. Lambert continued to occupy said office and exercise its privileges, powers and rights, the right to the writ is complete whether said Barrett has made any attempt to exercise the office himself or not. It is manifest that there could not be two persons holding the same office, and performing its duties at the same time, and it seems equally true that if the contestant had been duly elected and had qualified, and was eady and willing to enter upon his duties as such officer, at the time of filing his petition for the writ, and the contestee continued to usurp the office and perform its duties, that all conditions contemplated by

the Statute, Sec. 3022 Code 1904, have been met, and the writ should issue. That section declares that "a writ of quo warranto may be awarded etc. in any of the following cases: Fourth, against *any* person who shall intrude into or usurp *any* public office, etc. It is not therefore necessary that relator should have attempted to exercise his rights as a member of council and that such rights should have been denied him before he can apply for the writ. At least I can find no authority for the proposition and none has been cited me. The only requirements of the statute are that some person has entered into or usurped a public office, and that the petition be filed, in the event the Attorney General, or Attorney for the Commonwealth, as the case may be, has refused to apply for the writ, by a person *interested*. Sec. 3023, Code 1904. State *v.* Mathews, 44 W. Va., 372.

Third Ground of Demurrer:

"(3) That the term of office of the said Barrett commenced, if he was entitled to the office of a member of the Common Council, of the City of Alexandria, Virginia, on the 20th day of June, 1912, when a certificate of election was issued to him by the said Corporation Court and said Barrett not having qualified before his alleged term of office began, or, at least, on the day when his alleged term of office must have commenced, it was not lawful for him to qualify afterwards; that by reason of the said Barrett not qualifying on the day he received his certificate of election, the said Urban S. Lambert is entitled under Section 33 of the Constitution to hold said office until September, 1914."

Fifth Ground of Demurrer:

"(5) Even if the said Act of 1906 relates to members of City Councils, and though the election was to take place at the next general election, yet such general election is not considered as a general election in the case of filling a vacancy, because all elections to fill vacancies in any office are expressly declared by Section 110 of the Code of 1904, to be special elections; and Section 116 of the Code provides that at such elections it shall be the duty of the officer ordering such election, at least twenty days before such election, to issue a writ of election; and there are no allegations in the petition that any such notice was given, nor are there allegations in the petition that any lawful notice was given that a vacancy of the Council would be filled at such election."

The third ground of demurrer involves the question as to whether Robert S. Barrett, conceding his election to fill the unexpired term of Herbert S. Snowden after the regular June election, 1912, is regular and proper, qualified within the time

prescribed by law. If he did not, of course Urban S. Lambert held over, under the Constitution of Virginia, § 33. This in turn involves the fifth ground of demurrer, that is, whether the election on June 12th, 1912, was quoad filling the vacancy a special election, or a general election, and the commencement of the term of office of Robert S. Barrett depends upon the answer to this question. § 110, Code 1904, is as follows:

"Sec. 110. Special elections; what, and when held. Special elections shall be deemed to be such as are held in pursuance of a special law, and also such as are held to supply vacancies in any office, whether the same be filled by the qualified voters of the State or of any county, corporation, magisterial district, or ward, and the same may be held at such time as may be designated by such special law or the proper office duly authorized to order such elections."

It seems clear to me therefore that the general election held on June 12th, 1912, was, as to the election to fill the unexpired term of Herbert S. Snowden, a special election. Section 116 of the Code provides:

"Sec. 116. How in other cases. Whenever a special election is ordered to fill a vacancy otherwise than under the preceding section, it shall be the duty of the officer ordering such election, at least twenty days before such election, to issue his writ of election, directed to the sheriff of the county or sergeant of the corporation in which the election is to be held, designating therein the office to be filled, and the time and place of holding the same; upon receipt of which such officer shall proceed to cause public notice to be given of such election in the same manner as is required in the preceding section."

But it is manifest that the special election to fill the vacancy occasioned by the death of Herbert S. Snowden was held under §110, Code 1904, as it is "to supply a vacancy in office," and it seems further manifest that it is not necessary to give notice required by § 116, Code 1904, as the election to fill a vacancy in the Common Council (provided Acts 1906, pp. 17-18, repeals § 1015e of Code) is held under a special law with reference to filling such vacancies, which designates the time of holding such election, as provided by § 110 of the Code, to wit: at a general election occurring during the unexpired term. It further seems manifest that the general election referred to means a general election for municipal officers, on a 2nd Tuesday in June, as the Act, 1906, relates entirely and exclusively to municipal officers.

While an election to fill a vacancy in a municipal office elective by the people, is under the terms of § 110, Code 1904, and by rule of reason, it seems to me, a special election quoad filling

the vacancy, it is not a special election which must be ordered by any officer, and no officer is duly authorized by law to order it. Hence the provisions of § 116 do not apply. The Act of February 17, 1906, as above stated fixes the time as to the general election occurring during the vacancy. The notice is given by the act itself, and the election must occur whenever there is a vacancy at the time the regular election for municipal officers occurs. The only object of notice is to give the qualified voters an opportunity to participate in the election and prospective candidates to file their notices. This seems to be provided for by the act of 1906 itself.

If I am right in the foregoing conclusions, then the term of office of Robert S. Barrett commenced upon his qualification, to wit, on the 28th of June, 1912, under § 103, Code 1904:

"Sec. 103. When term of officer elected to fill vacancy commences and expires. The term of office of any person chosen at a special election to fill a vacancy in any public office shall commence as soon as he shall qualify and give bond, and continue for the unexpired term of such office."

And it did not commence immediately upon the issuance of his certificate of election by the Clerk.

The only remaining questions are involved in the fourth ground of demurrer:

Fourth Ground of Demurrer:

"(4) The Acts of Assembly approved February 17, 1906 Pollard's 1910 supplement, page 543, on which said Barrett relies for his writ of quo warranto does not apply to members of City Councils. Said Urban S. Lambert was elected and his right to hold office is controlled entirely by Section 1015e of the Code of 1904, which expressly provides that a person elected by the Council to fill a vacancy in its body shall hold office for the unexpired term."

Therefore two questions which arise in consideration of this proposition:

1. Are members of City Councils municipal officers?
2. If so, does not Act February, 1906, apply to members of City Councils?

Upon the first question I am clearly of opinion that they are. A great many cases were cited by the learned counsel on both sides upon the question as to what constitutes a county or municipal officer on the one hand, and what constitutes state officer on the other, and without referring to any of those authorities specifically at this time, suffice it to say that the Virginia Court of Appeals has apparently drawn this distinction between municipal and state officers. He is a state officer who, although he is elected by the qualified voters of a municipality,

and although his duties, etc., are limited to the confines of the municipality, performs in the discharge of those duties any public service in which the people of the State at large are interested. Within this class would be, for example, the commonwealth's attorney of a city, city sergeant, police officers, police justice, unless his jurisdiction were limited by law to trial of violations of ordinances of the city, etc. He is a municipal officer whose duties relate torely to municipal affairs, for example, attorney for the city, mayor, city surveyor, the various heads of city departments, members of council, etc. It is true, as contended by the learned counsel for Lambert, that the council is a legislative body, but it legislates purely for the municipality in which its members are elected, and the state at large has no interest in such legislation, and is not effected thereby, except in so far as the state is interested in the good government of its various subdivisions.

In the cases of Mitchell *v.* Witt, 8 Va. 461; Rychmond *v.* Lynch, 106 Va. 324; and Com. *v.* Gleason, 111 Va. 383, the question was not before the court as to whether members of council were municipal officers, and the language used in these decisions cannot therefore be regarded as conclusive of the questions, but taken in conjunction with the decisions of other cases drawing distinctions between purely municipal or county officers, on the one hand, and state officers, on the other, the conclusion seems irresistible to me that they are purely municipal officers. The courts of other states have, however, passed directly upon the question with apparent unanimity. Sec. 28, Cyc. 400, and cases therein cited.

If the determination of the foregoing question is correct, it assists somewhat in the determination of the last, most difficult and most important question submitted for decision, that is whether, admitting that members of council are municipal officers, are they included in the provisions of the act of February, 1906, or does this act by implication repeal § 1015e, Code 1904?

Section 1015e is as follows:

"Sec. 1015e. Vacancy; how filled. When any vacancies shall occur in the council of a city having one branch, or in either branch of the council of any city having two branches, by death, resignation, removal from the ward, failure to qualify, or from any other cause, the council, or the branch, as the case may be, in which such vacancy occurs shall elect a qualified person to fill the vacancy for the unexpired term."

Unless this section has been repealed by implication (because there is no express repeal in the Act of 1906), that is unless it

is in irreconcilable conflict with a later act on the subject, then it must be the law for filling vacancies in city councils.

The act of February 17, 1906, pp. 17-18, of said acts, entitled "An act to authorize the several cities and towns of this Commonwealth to appoint officers and employees in addition to those expressly authorized in their respective charters and to provide for the filling of vacancies in all municipal offices for the unexpired term" is as follows:

1. Be it enacted by the general assembly of Virginia, That the council of every city or town of this Commonwealth having in their several charters the power to appoint certain municipal officers shall, in addition to such power, have power to appoint such other officers and employees as the council may deem proper, or any committee of such council, or any municipal board, or the mayor of the city or town, or any head of a department of such city or town government, may also appoint such officers and employees as the council may determine, the duties and compensation of which officers and employees shall be fixed by the council of the city or town, except so far as the council may authorize such duties to be fixed by such committee or other appointing power, and may require of any of the officers and employees so appointed bonds, with sureties in proper penalties, payable to the city or town in its corporate name, with condition for the faithful performance of said duties. All officers so appointed may be removed from office at their pleasure by joint resolution of the two branches, and where the appointment is by a committee of board, by a vote of such committee or board, or where such appointment is by the mayor or head of a department, such removal may be by order of the mayor or head of department. In case of vacancies occurring in any municipal position so authorized to be filled, a qualified person may be appointed to fill such position for the unexpired term by the proper appointing power; and in case of vacancy in any municipal office which is elective by the people, if there be no general election during the unexpired term at which such vacancy can be legally filled, the city or town council may elect a qualified person to fill such vacancy until a qualified person can be elected by the people and shall have qualified for the next succeeding term, or when such general election does occur during the unexpired term at which such vacancy can be filled, such city or town council shall elect a qualified person to fill such vacancy until a qualified person is elected to fill such vacancy at such general election and shall have qualified.

The rule which has been laid down by our Court of Appeals in innumerable cases, is that statutes in pari materia should be read and construed together as if they formed part of the same

statute and were enacted at the same time, and where there is a discrepancy, or disagreement, among them, such should be reconciled, if possible, 29 Grat. 392, 98 Va. 459, 75 Va. 274, 99 Va. 495, 100 Va. 250, and many other cases makes this an exceedingly nice question in this case, and one which cannot be definitely settled until the court of last resort has passed upon it.

Under the foregoing decisions, I recognize the duty upon the Court, if possible, to reconcile the conflict in these statutes, but apparently the statutes are irreconcilably in conflict, and this conclusion becomes more certain if a member of council is a municipal officer, which we have undertaken to show he is, for the title of the act of 1906 is "An act to authorize the several cities and towns of this Commonwealth to appoint officers, etc. and to provide for the filling of vacancies in *all* (italics mine) municipal offices for the unexpired term;" while in the body of the act this language is used, "in case of vacancy in *any municipal office elective* by the people;" *any*, in the sense used, meaning every or all, or each one of all. Heaton *v.* Wight (N. Y.), How. Prac. 79; Peadody *v.* People, 4 Hill 384. No more comprehensive language could be used. Judge Moncure in Moore *v.* Va. Fire & Marine Ins. Co., 28 Grat. 516, says a more comprehensive word than "all" cannot be found in the English language. A member of council is one of the *municipal officers of a town elective by the people.* If § 1015e had not been on the statute books when the act of 1906 was passed, clearly a member of council would come within the purview of the act of 1906. There are no qualifying words, and no exceptions noted in the statute, the language used is most comprehensive, it is broad enough to cover and does cover members of council, if I am right in holding that they are municipal officers elective by the people. To exclude them we must read an exception into the statute which does not appear there. See Roanoke *v.* Blair, 107 Va. 639.

What was the intention of the Legislature in passing the act of 1906?

One cardinal rule of construction is that the intention of the legislature ought to prevail in the construction of statutes.

The act refers to two sets of officers. The first part enlarges the appointive power, and provides for filling vacancies in appointive offices, whereas the second part of the act provides for the filling of vacancies in all elective municipal offices.

The general law, § 1015e, prior to 1906 provided for filling vacancies in councils, and the method of filling vacancies in other municipal offices, state offices, county offices, etc., was provided for by various constitutional and statutory provisions. The intent of the Legislature in enacting the 1906 statute seems

to have been to provide a uniform method of filling vacancies not only for appointive municipal officers but for all elective municipal officers as well, to pass a general statute in place of all the various disjointed statutes on the subject. The act of February 17th, 1906, seems manifestly by the Legislature to have been intended to embrace and include the whole legislation on the subject to which it refers, viz: the filling of vacancies in *all* municipal offices. When this is the case the rule is that the provisions of former laws on that *subject* are repealed by implication. Somers *v.* Com., 97 Va. 759; Davies *v.* Creighton, 33 Gratt. 696; Crosly *v.* Supervisors, 2 W. Va. 416.

Since the adoption of the new constitution in Virginia, limiting the electorate, the policy of the state has been to enlarge the power of the people in the choice of public servants, and to limit as far as possible the appointive power. The above construction of the 1906 statute is in conformity with this policy. In the face of this moving cause how can any exception be read into the statute not embraced within its terms. In a very able opinion upon this branch of the case, Mr. Jno. M. Johnson says:

"The act of 1906 certainly repeals all of the special acts for filling vacancies in the offices above enumerated, and likewise repeals to the extent that the said act conflicts with the filling of vacancies in the office of councilmen. Sections 1015e and 1030. I do not think it is reasonable to hold that the act of 1906 was simply for the purpose of substituting a general law providing for filling vacancies in the offices above enumerated, for the special acts upon the subject. I can see no good reason for confining the words 'in any municipal office which is elective by the people' to such officers. A councilman is a position of great power and dignity, probably one of the most important in the gift of the people of a city or town. The public policy of the state or the people of the state has been a representative government for cities and towns, in which the people are supposed to elect their officers, and the constitution itself and the general law provides for the election of councilmen by the people, and it seems to me that it is in accord with such public policy to allow the people to have a say in said offices, or to elect persons to succeed to such vacancies if convenient for them to do so, and that appears to be the intent and spirit of the act approved February 17th, 1906, or to carry out the well known public policy of the state expressed in the Constitution and laws in the matter. I cannot conceive of any reason why the legislature's simple purpose was to repeal the special laws relating to the filling of vacancies in the minor municipal offices, and not to repeal the sections which provided for the filling of vacancies in the important offices of councilmen for

cities and towns. Section 1030 and Section 1015e and the Act of February 17th, 1906 must be read together, and if there be any conflict which cannot be reconciled the last Act must control. Until the Act approved February 17th, 1906 vacancies in council were filled under Sections 1015e and 1030 of the Code, and the council elected a qualified person to fill such vacancy for the unexpired term; but under the Act of February 17th, 1906 the Council fills the vacancy for the unexpired term if there be no general election during the unexpired term at which such vacancy can be filled; when such general election does occur during the unexpired term, at which such vacancy can be filled the council elects a qualified person to fill such vacancy only until a qualified person is elected to fill the vacancy at the general election. To this extent . Sections 1015e and 1030 are amended by the Act of February 17, 1906."

The case of Mitchell and others *v.* Witt, Judge, 98 Va. 459, was cited as authority by the learned counsel for Urban S. Lambert for the contention that members of council were not contemplated by the Act of February 17, 1906, and under the influence of his very persuasive argument I was at first inclined to the same view, but an examination of the case shows that the two statutes alleged to be in conflict in that case were § 130 of the Code 1904, embraced in Ch. 11, entitled "Elections by the People," and § 1030, Code 1904, embraced in Ch. 44, entitled "Cities and Towns." Clearly a case of statutes in pari materia, where apparent conflict can be reconciled, but § 1015e is embraced in Ch. 44, Code 1904, entitled "Cities and Towns," and clearly the statute of February 17, 1906 has its logical place in the same chapter under the same title, and was enacted subsequently to § 1015e.

When two statutory provisions in pari materia are passed at different times and are irreconcilable the court will give effect to the last passed. Haynes *v.* Com., 3 Gratt. 96.

For the foregoing reasons that demurrer and each ground thereof is overruled, and judgment will be entered for the plaintiff on the merits.